88-1694

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT E. MUPRHY, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF MILITARY APPEALS

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APRIL 1989

35 pp

QUESTION PRESENTED

Whether the petitioner was denied due process of law when his military jury was composed of some members who were not independent of each other.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

ROBERT E. MUPRHY, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Robert E. Murphy, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on March 9, 1989.

OPINIONS BELOW

The initial opinion of the United States Air Force Court of Military Review is reported at 23 M.J. 690 (A.F.C.M.R. 1986) (Appendix A). A subsequent opinion, based on a Government request for reconsideration, is reported at 23 M.J. 764 (A.F.C.M.R. 1986) (Appendix B). The opinion of the United States Court of Military Appeals is reported at 26 M.J. 454 (C.M.A. 1988) (Appendix C). Upon remand the United States Air Force Court of Military Review issued an unreported decision on October 28, 1988 (Appendix D). Finally, the March 9, 1989, order of the United States Court of Military Appeals is reported at __ M.J. __ (C.M.A. 1989) (Appendix E).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on March 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp III 1985) and 10 U.S.C. § 867(h) (Supp III 1985).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

R.C.M. 912 (f)(1), Manual for Courts-Martial, United States, 1984, provides the following:

(f) *Challenges and removal for cause.*

(1) Grounds. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an investigating officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

STATEMENT OF THE CASE

The petitioner, an Air Force Staff Sergeant (E-5), was tried by a general court-martial on April 22, 1986, at Royal Air Force Bentwaters, England. He pled guilty to committing sodomy with a child under 16 years of age, assault, and multiple allegations of indecent acts and liberties with a child under the age of 16. The petitioner was sentenced to a dishonorable discharge, confinement for 10 years, and reduction to Airman Basic (E-1). The petitioner elected to have officer members decide the sentencing portion of his trial.[1] The defense challenged two of the senior

[1] The terms "members" or "court members" refer to the military jurors. "Senior" and "junior" court members refer to the relative ranks of the military jurors.

court members on the basis that they actually or potentially wrote or endorsed the Officer Effectiveness Reports (OERs) of two junior court members.[2] The trial judge denied the challenges because he was convinced that these members could fashion a sentence based solely upon the evidence presented.

The United States Air Force Court of Military Review set aside the sentence. *United States v. Murphy,* 23 M.J. 690, 691 (A.F.C.M.R. 1986). The Court expressed its concern about "the fact that the challenged member was in a position to improperly influence the determination of the accused's sentence." *Id.* This decision was affirmed upon reconsideration. *United States v. Murphy,* 23 M.J. 764 (A.F.C.M.R. 1986). The United States Court of Military Appeals reversed the decision of the United States Air Force Court of Military Review, and remanded the case on matters unrelated to this appeal. *United States v. Murphy,* 26 M.J. 454 (C.M.A. 1988). The reversal was predicated on the view that "the Court of Military Review erred in establishing a *per se* rule of disqualification for a senior member of the court-martial who writes or endorses an efficiency report of a junior member." *Id.* at 455. Upon a subsequent review, the United States Court of Military

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[2] An OER is a required evaluation that must be accomplished on every Air Force officer. This evaluation is a comprehensive assessment of an officer's professional and personal life. These evaluations are prepared on a regular basis (usually annually), and are written by a superior officer who is responsible for and familiar with the officer being evaluated. The officer who writes the evaluation is known as a rater. Subsequent evaluators are known as endorsers. An endorser is usually a more senior officer (by virtue of rank and/or position) than the rater. As such, endorsers provide input from what may be termed "upper level management." OERs are utilized in determining an officer's fitness and eligibility for promotions, assignments, schools, and a variety of other matters that are central to an officer's career.

Appeals affirmed the remanded decision of the United States Air Force Court of Military Review. *United States v. Murphy,* __ M.J. __ (C.M.A. 1989).

REASONS FOR GRANTING THE WRIT

Article 16, U.C.M.J., provides that an accused may elect to be tried before a military jury (consisting of at least five members) or military judge alone. In the case *sub judice,* the petitioner selected a military jury composed entirely of officer members.

Military courts, by virtue of their rank structure, are different from their civilian jury counterparts. *United States v. Accordino,* 20 M.J. 102, 104 (C.M.A. 1985). Hence, they possess a greater potential for abuse. Specifically, military courts are vulnerable to the tentacles of command influence. Command influence is neither a minor nor tolerable aspect of military justice. Instead, "[c]ommand influence is the mortal enemy of military justice." *United States v. Thomas,* 22 M.J. 388, 393 (C.M.A. 1986). As such, one of the major objectives of the Uniform Code of Military Justice is the elimination of command influence. *United States v. Wood,* 48 C.M.R. 528, 531 (C.M.A. 1974).

OERs are more than a mere evaluation. They are the "ticket" to a successful Air Force career. They are the command tool which directs the destiny of each and every Air Force officer. Since OERs are critical to the promotion system, they thereby have a direct effect on an officer's pay and retirement. In short, OERs are the yardsticks by which careers are measured.

In the instant case, the defense challenged two senior members who actually or potentially had an impact on the OERs of two junior court members. While the petitioner does not assert that the senior members acted unscrupu-

lously, the petitioner does question the "chilling effect" on the junior members. The junior court members may have been inhibited or influenced based upon their perceptions of how their raters or endorsers viewed the evidence. Hence, they may have sentenced the petitioner on the basis of misplaced perceptions, and not upon the evidence presented. Clearly, their initial disclaimers are neither dispositive nor controlling. *United States v. Harris,* 13 M.J. 288, 291 (C.M.A. 1982). Moreover, there is no guarantee that their initial disclaimers survived the significant and inherent pressures of the deliberative process. Hence, "[p]rejudice must be suspected. . . ." *United States v. Smart,* 21 M.J. 15, 20 (C.M.A. 1985).

This Court has addressed a somewhat similar situation. In *Tumey v. Ohio,* 273 U.S. 510 (1927), this Court struck down a state statute which permitted a town mayor to sit as a judge in cases involving the unlawful possession of liquor. This Court held that the petitioner was denied due process of law because the judge's compensation was made a function of the fines he adjudged. That is, this Court found that the petitioner was denied due process of law by virtue of the judge's pecuniary interest in convicting and sentencing the petitioner. Moreover, this Court announced that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* at 532.

In the instant case, there is the profound danger that the junior members, like the mayor/judge, were influenced by self-serving pecuniary interests. Curiously, the United States Court of Military Appeals never addressed this issue. Instead, it was content with relying upon "the integrity and character" of the officer corps. *United States v. Murphy,* 26 M.J. 454, 456 (C.M.A. 1988). While such at-

tributes are laudable, they are grossly inadequate for insuring due process of law.

R.C.M. 912(f), Manual for Courts-Martial, United States, 1984, enumerates the recognized disqualifications for cause. While this issue is not expressly addressed in this rule, it is properly encompassed within R.C.M. 912(f)(1)(N), Manual for Courts-Martial, United States, 1984. Specifically, there is "substantial doubt" about the "fairness" of permitting such members to remain on the petitioner's military jury. The United States Air Force Court of Military Review shared a similar concern when it held that "we read *Harris* as an attempt to insure that the military justice system is not only fair, but seen by others to be fair." *United States v. Murphy,* 23 M.J. 764, 765 (A.F.C.M.R. 1986). Likewise, the record is devoid of any evidence to suggest that military exigencies shaped the composition of the petitioner's military jury. *United States v. Garcia,* 15 M.J. 864 (A.C.M.R. 1983).

It is axiomatic that military members are entitled to due process of law. *Cooke v. Orser,* 12 M.J. 335, 338 (C.M.A. 1982). Likewise, it is self-evident that when OER relationships are permitted to remain on a military jury, the result is a denial of due process. In this context, the OER system evolves into improper command influence. OERs are prepared by those in "command" for the benefit of "command." It is a matter of common knowledge that OERs may be the single most powerful force in an Air Force officer's career. As such, it is clearly erroneous to permit a junior member to serve on the same military jury with the very person or persons who prepare or endorse this career determining document. Hence, such an arrangement constitutes a denial of due process.

While this case has no civilian counterpart, this case is especially significant to the military community. By denying the petitioner relief, the United States Court of Mili-

tary Appeals has now institutionalized a form of command influence. Namely, every branch of service may now deny, with impunity, the due process rights of similarly situated service members. As a result, every court-martial is now potentially vulnerable to this insidious form of command tampering. Without Supreme Court intervention this problem will continue unabated. That is, no civilian court will ever wrestle with this type of issue. Moreover, the United States Court of Military Appeals has expressly created this rogue elephant. Hence, the petitioner's cause rests solely with this Court.

CONCLUSION

The petitioner submits that he has suffered a denial of due process of law. Therefore, his petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 25477

UNITED STATES

v.

STAFF SERGANT ROBERT E. MURPHY, JR., FR 317-58-9430
UNITED STATES AIR FORCE

---

5 Nov. 1986

Sentence adjudged 22 April 1986 by GCM convened at Royal Air Force Bentwaters, England. Military Judge: N. Steven Linder.

Approved sentence: Dishonorable discharge, confinement for ten (10) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Charles E. Ambrose. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Joe R. Lamport and Lieutenant Colonel Morris A. Tanner, Jr.

Before

HODGSON, FORAY and MICHALSKI
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

The facts in *United States v. Harris,* 13 M.J. 288 (C.M.A. 1982), an Air Force trial, are virtually identical to those before us today. In *Harris, supra,* the Court of Military Appeals held that the trial judge erred in denying a challenge for cause against a member who was the president of the court and who wrote or endorsed the effectiveness report of three other members. There, the trial judge after receiving the challenged member's assurances that he had no personal interest in the case and would remain impartial, denied the challenge stating:

> [The member] indicated that he had no direct personal interest in the results of the trial and that he was free, mentally, to render a fair and impartial verdict after hearing the evidence and law. I will deny the defense's challenge for cause.

The Court of Military Appeals found this rationale inadequate, as *a matter of law,* as a basis for denying the challenge. The Court went on to state that "where circumstances are present which raise 'an appearance of evil' in the eye of disinterested observers, mere declarations of impartiality, no matter how sincere, are not sufficient by themselves to insure legal propriety." *Harris, supra,* at page 292. The Court pointed out that disclaimers of this nature are not unusual in military or civilian practice when a court member is challenged on the basis of actual bias. *It placed emphasis on the fact that the challenged member was in a position to improperly influence the determination of the accused's sentence.*

In the case at bar, the president of the court and another senior member, both colonels, wrote or endorsed the effectiveness reports on two other members. Both colonels

assured the trial judge that this circumstance would not be used by them in an attempt to influence the judgment of the other members. The trial judge, in denying the challenge to both, indicated:

> I observed Colonel [A] and Colonel [C] while they were answering questions; I was most impressed with their demeanor and most impressed with their desire to put those matters aside and decide the cases solely on the evidence without regard to their relationships to these individuals.

In our view there is not a significant difference between the situation described in *Harris* where the Court of Military Appeals found that the trial judge erred in denying the challenge for cause, and this case. While we are confident that the challenged members were sincere in their declarations of impartiality, the guidance set forth in *United States v. Harris, supra,* is clear.

Since the appellant's conviction of sodomy with a child under 16 years of age, assault, and multiple allegations of indecent acts with a child under 16 years of age is based on a pre-trial agreement properly entered into, the findings of guilty as to those offenses are affirmed. For the reasons stated, the sentence is set aside. A rehearing on sentence may be ordered.

Senior Judge FORAY and Judge MICHALSKI concur.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 25477 (recon)

UNITED STATES

v.

STAFF SERGANT ROBERT E. MURPHY, JR., FR 317-58-9430
UNITED STATES AIR FORCE

---

12 December 1986

Sentence adjudged 22 April 1986 by GCM convened at Royal Air Force Bentwaters, England. Military Judge: N. Steven Linder.

Approved sentence: Dishonorable discharge, confinement for ten (10) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Charles E. Ambrose. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Joe R. Lamport and Lieutenant Colonel Morris A. Tanner, Jr.

Before

HODGSON, FORAY and MICHALSKI
Appellate Military Judges

DECISION UPON RECONSIDERATION

HODGSON, Chief Judge:

On consideration of appellate government counsel's MOTION FOR RECONSIDERATION, dated 20 November 1986, and noting that appellate defense counsel does not oppose the MOTION FOR RECONSIDERATION,

NOW, THEREFORE, it is by the Court, this 12th day of December 1986,

ORDERED:

That the MOTION FOR RECONSIDERATION be and the same is, hereby GRANTED.

In our original decision, *United States v. Murphy,* 23 M.J. 690 (A.F.C.M.R. 1986), we concluded that the trial judge erred in not granting a challenge for cause against senior members of the panel who wrote or directly endorsed the effectiveness reports of two other members. Our reading of *United States v. Harris,* 13 M.J. 288 (C.M.A. 1982) led us to reason that such a circumstance raised "an appearance of evil in the eye of disinterested observers" notwithstanding sincere declarations of impartiality by the challenged members.

Appellate government counsel filed a motion for reconsideration of that decision urging that we misread *Harris* and that two additional factors were present in *Harris* that are not present here, i.e., the challenged member there was the chairman of the base resource protection committee and additionally he supervised the two victims of the alleged theft. They further suggest that our *per se* rule of disqualification in this area makes it extremely difficult at many installations to assemble a court to include senior members who are not potential additional raters or endorsers of other members.

Addressing the second concern first, we find it difficult to believe that a special court-martial convening authority cannot select at least three members who are not disqualified under the circumstances we considered in *Murphy,* or that a general court-martial convening authority cannot select at least five. See Article 16(1)(A) and (2)(A), U.C.M.J., 10 U.S.C. § 816(1)(A), (2)(A). Accordingly, there appears to be no substantial impact on the administration of military justice because of the rule we are espousing. We did not in our original decision nor do we today expand the category of individuals subject to those members who are "potential additional raters or endorsers of other members." Rather, our prohibition is against members rating other members who are, in the ordinary course of affairs, in their direct supervisory chain. The rater-ratee relationship must be actual not merely a possibility. *See generally United States v. Carfang,* 19 M.J. 739 (A.F.C.M.R. 1984).

We acknowledge there are factual differences in *Harris* that are not present in this case; however, we read *Harris* as an attempt to insure that the military justice system is not only fair, but seen by others to be fair. We consider the holding in our initial *Murphy* decision to be a logical extension of that principle. We are aware that a higher appellate court might well disagree with our conclusion and the reasoning supporting it. We welcome their guidance.

Appellate government counsel also suggest that our creation of a *per se* rule regarding challenges in this area will create turmoil in cases already tried but pending appeal. This is a reasonable concern. Our decision in *Murphy* does create a basis for challenge that the trial bench and the bar were unaware of. The granted relief in a case may be limited to that appellant whose case was chosen as the vehicle for establishing the new standard. *See Desist v. United States,* 394 U.S. 244, 89 S. Ct. 1030, 22 L.Ed.2d

248 (1969). Accordingly, the new standard will be applied prospectively to cases tried 30 days from the date of this decision. *United States v. Goode,* 1 M.J. 3 (C.M.A. 1975); *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); *United States v. Donohew,* 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969).

Except as modified herein, our decision in the appeal of *United States v. Murphy,* 23 M.J. 690 (A.F.C.M.R. 1986) is

AFFIRMED.

Senior Judge FORAY and Judge MICHALSKI concur.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 56,897
ACM 25477

UNITED STATES, APPELLANT AND CROSS-APPELLEE

v.

ROBERT E. MURPHY, JR., STAFF SERGANT, U.S. AIR FORCE,
APPELLEE AND CROSS-APPELLANT

Sept. 26, 1988

For Appellant: *Major William J. Reichart* (argued); *Colonel Leo L. Sergi* (on brief); *Major Charles E. Ambrose, Jr.* and *Major Timothy J. Malloy.*

For Appellee: *Lieutenant Colonel Morris A. Tanner, Jr.* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief).

OPINION OF THE COURT

Cox, Judge:

The accused was tried by a general court-martial composed of officer members at Royal Air Force Bentwaters, England. Pursuant to his pleas, he was found guilty of sodomy with a child under the age of 16 years, assault and battery on his wife, and eleven specifications alleging taking indecent liberties or committing indecent acts with a

female under the age of 16, in violation of Articles 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928, and 934, respectively. He was sentenced to confinement for 10 years, reduction to E-1, and a dishonorable discharge. The convening authority approved the sentence. Citing *United States v. Harris,* 13 M.J. 288 (C.M.A.1982), the Court of Military Review held that the military judge erred in failing to grant challenges against two senior members of the court-martial, because they wrote or endorsed the effectiveness reports on two other members. 23 M.J. 690 (1986). On reconsideration, although recognizing factual distinctions between *Harris* and the case at bar, the court adhered to its original decision establishing a *per se* rule of disqualification of a member who rates or endorses the effectiveness report of other members of that court-martial. 23 M.J. 764 (1986). The Judge Advocate General certified the following issue to this Court:

> WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW IN ESTABLISHING A RULE THAT A MEMBER WHO WRITES OR ENDORSES THE OER [OFFICER EFFECTIVENESS REPORT] OF ANOTHER MEMBER IS *PER SE* SUBJECT TO A CHALLENGE FOR CAUSE.

Additionally, this Court granted review of the following issues upon a cross-petition filed by the accused:

I

WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ADMIT INTO EVIDENCE DEFENSE EXHIBIT V, AN EXCERPT FROM CHAPTER V of AFR 125-18.

II

WHETHER THE MILITARY JUDGE ERRED BY PREVENTING DEFENSE COUNSEL FROM ARGUING ANY PERIOD OF CONFINEMENT OVER EIGHTEEN MONTHS WOULD MOST LIKELY PREVENT THE ACCUSED FROM BEING ACCEPTED INTO THE 3320th CORRECTION AND REHABILITATION SQUADRON (CRS).

We will address the certified issue first. Upon *voir dire,* the president of the court-martial stated that he was in the chain-of-command of two junior members and that, while he was normally not their reporting official, he might be required to sign as an additional rater if the senior officer of the unit was not present. Additionally, another senior member observed that he was the reporting official for one other member and a reporting official once removed for a second member. All of the members involved in the chain-of-command or rating regime raised during *voir dire* agreed that rank or position of the senior members would not affect their ability to render impartial judgment. The military judge, after noting the disclaimers and the demeanor of the members involved, denied the defense challenges to the two senior members.

We hold that the Court of Military Review erred in establishing a *per se* rule of disqualification for a senior member of the court-martial who writes or endorses an efficiency report of a junior member.

Although we held that a senior member of a court-martial who rated other members was disqualified in *United States v. Harris, supra,* an examination of that case reveals that additional and more compelling reasons sup-

ported the conclusion that the member was disqualified. Specifically, the lead opinion observed that the member in question also worked closely with and rated two of the victims of the thefts for which the accused was charged and was chairman of the base-resource protection committee. Additionally, two of the victims had advised him of some of the facts of the case. Indeed, in his opinion concurring in the result, Judge Cook observed that "[b]y far the most significant of the allegedly disqualifying factors cited was . . . [the member's] professional relationship with two of the seven theft victims." *Id.* at 293. Furthermore, although the member's endorsing or writing efficiency reports of three other persons was one of several factors in *Harris,* the lead opinion relied upon *United States v. Deain,* 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954). An examination of *Deain* reflects that it, too, was based on factors in addition to the one at issue. Specifically, the author of the lead opinion in *Deain* observed:

> It may be conceded that the mere fact that the senior, or other member of the court, coincidentally has the duty to prepare and submit a fitness report on a junior member, in and of itself, does not affect the junior's "sense of responsibility and individual integrity by which men judge men." *Dennis v. United States,* 339 U.S. 162, 94 L.Ed. 734, 70 S.Ct. 519. So, if, as in the hypothetical case cited by the board of review, the convening authority designates two officers to serve on a court, one of whom is the normal reporting senior of the other, no reasonable man would believe that the senior is put in a position to exert undue control over the deliberations of the other. Their association as court members and the submission of a fitness report is not incompatible. We seriously doubt that either member would give

> thought to the fact that one is charged with the responsibility of reporting on the general fitness of the other. However, there is a different situation in the instant case.

5 U.S.C.M.A. at 52, 17 C.M.R. at 52. While the senior member in *Deain* wrote the efficiency reports of other members, the efficiency reports in question were not the "usual kind." Rather, the senior officer was judging, within the context of the efficiency report, the members' performance of duty as permanent members of a court-martial, rather than the performance of other military duties. Furthermore, the senior member in question acknowledged that he gave new court members pretrial "indoctrinations," which contained his interpretations of the law. Thus, neither *United States v. Harris* nor *United States v. Deain,* both *supra,* can be read as establishing a *per se* rule for disqualification of a senior court member who prepares and submits a fitness report on a junior member in the normal course of events.

In ruling on the qualifications of court members who are not specifically disqualified within the provisions of R.C.M. 912(f)(1), Manual for Courts-Martial, United States, 1984, we have shown great deference to the military judge's exercise of discretion. *United States v. Huitt,* 25 M.J. 136 (C.M.A.1987); *United States v. Towers,* 24 M.J. 143 (C.M.A.1987); *United States v. Reynolds,* 23 M.J. 292 (C.M.A.1987). We have examined the evidence presented in this record and conclude that it supports the military judge's conclusion that the challenged members could decide the case based solely on the evidence and without regard to their relationships with the other members. Accordingly, we hold that the Court of Military Review erred as a matter of law in applying a *per se* disqualification predicated solely on the fact that a senior

member of the court-martial is involved in writing or endorsing the effectiveness reports of junior members.*

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*I have attempted to fashion an opinion based upon what I believe is a correct interpretation of Article 25, Uniform Code of Military Justice, 10 U.S.C. § 825, and the earlier precedents of this Court. I also have tried to create a rule of law in harmony with constitutional precedents. *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). In view of Chief Judge Everett's opinion, I feel obligated to express several personal concerns about the Air Force Court's interpretation of our earlier cases. Before doing so, however, I shall go on record as agreeing with the principle that convening authorities should avoid placing superior-subordinate combinations on courts-martial to the extent practicable.

I see at least three reasons why I disagree with the construction given *United States v. Harris,* 13 M.J. 288 (C.M.A.1982), by the Court of Military Review and Chief Judge Everett:

1. Congress intended for the services to have a *Uniform* Code of Military Justice, not one that is *service-unique.*

2. Congress created the military judge. We have consistently and liberally given military judges the tools to deal with challenges for cause and peremptory challenges and have admonished them to use this power liberally. *See United States v. Carter,* 25 M.J. 471 (C.M.A.1988); *United States v. Huitt,* 25 M.J. 136 (C.M.A.1987); *United States v. Towers,* 24 M.J. 143 (C.M.A.1987); *United States v. Reynolds,* 23 M.J. 292 (C.M.A.1987). Let's give the judges the opportunity to use these tools. I am an advocate of selecting as military judges, intelligent, capable men and women of integrity and ethics, and then *trusting them* to ferret out and destroy evils and "the appearance of evil." I am comfortably confident in my opinion that the Air Force and the other military services have selected such persons to serve as judges and base my position on what I have observed when personally reading the thousands of records of trial that pass through my Chambers.

3. Lastly, and most importantly, the *per se* disqualification rule is an affront to the integrity and character of our field-grade officers, and I refuse to subscribe to it. In the almost 4 years I have served on this Court, I have reviewed over 10,000 courts-martial. I do not recall—but I stand to be corrected—reviewing a record of trial that has contained a *single allegation* by any court member that he or she has

Turning to the granted issues, we note that defense counsel attempted to introduce an extract of Air Force Regulation 125-18, which sets forth criteria governing an accused's eligibility for entry into the 3320th Correction and Rehabilitation Squadron. He particularly wanted to emphasize in argument that as a criterion for eligibility, an accused must have no more than 18 months of approved confinement remaining to be served. We recently observed in *United States v. Griffin,* 25 M.J. 423 (C.M.A.), *cert. denied,* __ U.S. __, 108 S.Ct. 2849, 101 S.Ct. 886 (1988), that an accused should be sentenced without regard to the collateral administrative consequences of the sentence in question. *Accord United States v. Quesinberry,* 12 U.S.C.M.A. 609, 31 C.M.R. 195 (1962). Therefore, we hold that the military judge's rulings excluding this evidence were within the bounds of his discretion.

The decision of the United States Air Force Court of Military Review as to the sentence is reversed. The record of trial is returned to the Judge Advocate General of the Air Force for resubmission to that court for further review of the sentence.

SULLIVAN, Judge (concurring with reservations):

I concur with the holdings and the text of the majority opinion. However, since the footnote is personal in nature, I do not adopt it.

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been threatened or intimidated into a particular course of action by a senior member's role in the preparation of efficiency reports. I do not recall having heard a single allegation that an efficiency report has been downgraded as a result of service as a court-martial member. Indeed, the congressional hearings giving rise to the Uniform Code of Military Justice prove that a driving force behind the creation of the Code was to eliminate such coercion. Article 37(b), UCMJ, 10 U.S.C. § 837, reflects this concern.

EVERETT, Chief Judge (concurring in part and dissenting in part):

I

In *United States v. Deain,* 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954), this Court invalidated an arrangement whereunder a Navy Admiral served as permanent president of a general court-martial and submitted to the convening authority fitness reports on two other members of the court-martial. Although we expressed doubt that the impartiality of a court-martial member would be negated simply because one was "the normal reporting senior of the other," *id.* at 52, 17 C.M.R. at 52, we concluded that, under the circumstances, the "freedom and independence of action" of the two members had been unduly threatened. Therefore, the findings and sentence were "set aside"; and, in "the interests of justice," the charges were dismissed. *Id.* at 53, 17 C.M.R. at 53.

In 1968, as a result of congressional concern about the possible use "of an effectiveness, fitness, or efficiency report" to influence the action of court members, Article 37 of the Code, 10 U.S.C. § 837, was amended to prohibit consideration of "the performance of duty of any" person "as a member of a court-martial" in preparing such a report on that person.[1] Art. 37(b); Pub.L.No. 90-632, § 2(13)(D), 82 Stat. 1338. Moreover, in order to assure that the judges of Courts of Military Review would retain their independence, Congress amended Article 66(g) of the Code, 10 USC § 866(g), to prohibit a "member of a Court of Military Review" from "prepar[ing] . . . or submit[ting]

[1] Article 37 also was amended to provide that a service member may not be "give[n] a less favorable rating . . . because of the zeal with which such member, as counsel, represented any accused before a court-martial." *See* Art. 37(b).

. . . an effectiveness, fitness, or efficiency report" on any other member of a Court of Military Review. Pub.L.No. 90-632, § 2(27)(E), 82 Stat. 1341.

In *United States v. Harris,* 13 M.J. 288, 292 (C.M.A. 1982), we were concerned with a defense challenge for cause of a court member who "wrote or endorsed the fitness reports of three other members." Despite protestations by all concerned that this relationship would not influence their respective independence of judgment, we noted that, "where circumstances are present which raise 'an appearance of evil' in the eye of disinterested observers, mere declarations of impartiality, no matter how sincere, are not sufficient by themselves to insure legal propriety." (Footnote omitted.)

Clearly, both Congress and this Court are concerned about possible misuse of personnel reports to inhibit the independence of court-martial members. Nevertheless, I conclude that neither the Code nor our decision in *Harris* requires a *per se* rule of disqualification if one member of a court-martial rates another member. Instead, impartiality can be assured by means of proper *voir dire* on the part of the judge and counsel, liberality in granting challenges for cause, and instructions by the military judge to the court-martial members that for anyone to consider their performance as members in preparing a fitness report would violate the Uniform Code, *see* Art. 37, and might well be a crime, *see* Art. 98, UCMJ, 10 U.S.C. § 898.

II

The Court of Military Review held that a challenge for cause should be sustained when one member of a court-martial is "in the ordinary course of affairs in [the] direct supervisory chain" of another member. 23 M.J. 764, 765 (1986). If the court below concluded that this *per se* rule

was required by *Harris* or by the Code, then it was in error. If, however, the Court of Military Review concluded that, within the Air Force, such a *per se* rule should be enforced for administrative convenience and in order to avoid "an appearance of evil," then I believe that such a decision was within their power. These appellate military judges are much more familiar than are the judges of this Court with the Air Force system of officer effectiveness reports, the impact of low ratings on a recipient's professional career, the effect of the rating system on the behavior of the persons rated, and the difficulties in applying such a rule in the field. In my view, they are entitled to rely on their experience in overseeing the administration of military justice in the Air Force.

Admittedly, adoption of a *per se* rule of disqualification by the Air Force Court of Military Review might lead to divergence in practice between that service and the other services. However, in light of the variations in practice that exist in several other areas—such as in plea bargaining and in the methods for delivering defense services—I would not be troubled if the Air Force subjects itself to a more stringent standard than do its sister services. In my view the power of the Air Force Court of Military Review with respect to that service is like the supervisory power of a United States Court of Appeals within its circuit. *Cf. United States v. Boston,* 7 M.J. 954 (A.F.C.M.R.1979) (on reconsideration).

Admittedly, it may be inconvenient to appoint court-martial members of whom none is in a direct supervisor-subordinate relationship. However, the Court of Military Review has the experience to evaluate the magnitude of the problems that will be created in this regard. Moreover, that court can decide whether it is simpler and less time-consuming to use a *per se* rule than to engage in extensive *voir dire* of the court members about their perceptions as

to the effects of a supervisor–subordinate relationship among some of the members. That court can determine how important it is to avoid the possibility that someone who has served on a court-martial and has not been promoted or obtained a favorable assignment will complain later that he was discriminated against by a supervisor who had served on a court-martial with him.

The Court of Military Review decided to apply its rule of disqualification prospectively–except for Murphy. Even though such an approach was permissible at one time, *see Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969), apparently the Supreme Court no longer will allow an overruling decision to be made applicable only to the case in which it was rendered and not to other cases that also were undergoing review. *See Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). However, I am of the view that a decision can be made entirely prospective in its application. *Cf. United States v. Carter,* 25 M.J. 471 (C.M.A.1988). Thus, I would not apply the *per se* rule of disqualification, even with respect to the challenges for cause in the present case.

It is unclear to me whether the Court of Military Review applied its *per se* rule of disqualification because it believed this was desirable for trials by court-martial in the Air Force or whether, instead, it felt such a result was compelled by our decision in *Harris.* I would, therefore, remand the case to the court below, which may then decide independently as to the need for a rule of *per se* disqualification in the Air Force.[2]

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[2] In my view, determination of the need for a *per se* rule of disqualification should be decided for each service by the Court of Military Review which reviews the trials by court-martial in that service and which is familiar with the personnel practices in that service. *Cf. United States v. Johanns,* 20 M.J. 155 (C.M.A.), *cert. denied,* 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1985) (relying on a determination by the Air Force Court of Military Review as to the customs of that service concerning fraternization).

APPENDIX D

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 25477 (f rev)

UNITED STATES

v.

STAFF SERGANT ROBERT E. MURPHY, JR., FR 317-58-9430
UNITED STATES AIR FORCE

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28 October 1988

Sentence adjudged 22 April 1986 by GCM convened at Royal Air Force Bentwaters, England. Military Judge: N. Steven Linder.

Approved sentence: Dishonorable discharge, confinement for ten (10) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi, Major William J. Reichart, Major Charles E. Ambrose, Jr. and Major Timothy J. Malloy. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Lieutenant Colonel Morris A. Tanner, Jr.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

In our original consideration of this case we affirmed the appellant's conviction for sodomy with a child under 16 years of age, assault, and multiple allegations of indecent acts with a child under the age of 16, but ordered a rehearing on the sentence. In doing so, we held that the trial judge erred in not granting a challenge for cause against senior members of the court-martial panel who wrote or directly endorsed the effectiveness reports of two other members. *United States v. Murphy,* 23 M.J. 690 (A.F.C.M.R. 1986), *aff'd upon recon.* 23 M.J. 764 (A.F.C.M.R. 1986). Thereafter, The Judge Advocate General of the Air Force filed a certificate of review with the United States Court of Military Appeals who determined that a *per se* rule of disqualification is not required for a senior member of a court-martial who writes or endorses the effectiveness report of a junior member. *United States v. Murphy,* 26 M.J 454 (C.M.A. 1988). Accordingly, our decision was reversed and the record of trial returned to us for further review of the sentence.

The approved sentence is this case extends to a dishonorable discharge, 10 years confinement, and reduction to airman basic which is less than the terms of the pretrial agreement entered into by the parties.

We have considered the nature and duration of the appellant's misconduct with his step-daughter in addition to the other offenses involving his wife and another child.

We consider the approved sentence to be entirely appropriate and it is

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX E

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 56897/AF
CMR Dkt. No. 25477

UNITED STATES, APPELLEE

v.

ROBERT E. MURPHY, JR., (317-58-9430), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review on further review, we conclude that there is no merit to the issue raised by appellate defense counsel. *See United States v. Wynn,* 26 MJ 405 (CMA 1988). Accordingly, it is by the Court, this 9th day of March, 1989

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Military Review on remand is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court